

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
BRADLEY RAY WARKENTIN,) No. 10-35332-rld11
Debtor.) MEMORANDUM OPINION

On July 5, 2011, I held a hearing ("Hearing") on the debtor Bradley Ray Warkentin's ("Mr. Warkentin") objection to Claim No. 10 (amended) ("Objection") of One West Bank, FSB ("One West"). Following argument from counsel for the parties, I took the matter under advisement.

Since the Hearing, I have reviewed the Objection and the Response to Objection to Claim ("Response") filed by One West, as well as applicable legal authorities. I also have taken judicial notice of the docket and documents filed in Mr. Warkentin's chapter 11¹ case, case number 10-35332-rld11, for purposes of confirming and ascertaining facts

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 not reasonably in dispute. See Federal Rule of Evidence 201; In re
2 Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. PA 2006).

3 This Memorandum Opinion sets forth my fact findings and
4 conclusions of law in light of the evidentiary record before me pursuant
5 to Fed. R. Civ. P. 52(a), applicable with respect to this contested
6 matter pursuant to Rules 7052 and 9014.

7 8 Factual Background

9 The facts relevant to this matter are not in dispute. On or
10 about August 8, 2006, Mr. Warkentin executed and delivered a Promissory
11 Note ("Note") in favor of American Mortgage Network, Inc., dba American
12 Mortgage Network of Oregon ("American Mortgage") in the principal amount
13 of \$224,000. Payment of the Note was secured by a deed of trust on
14 certain real property (the "Property") located in Bend, Oregon. One West
15 is the successor in interest to American Mortgage.

16 Mr. Warkentin filed his chapter 11 petition on June 7, 2010.
17 See Docket No. 1. In his Schedules A and D, Mr. Warkentin valued the
18 Property at \$90,000. He included One West as a secured creditor in
19 Schedule D, with a security interest in the Property valued at \$90,000
20 and an unsecured claim for \$134,000. On June 14, 2010, Mr. Warkentin
21 filed and served on One West a motion to value the Property ("Valuation
22 Motion") at \$90,000. See Docket No. 18. One West did not file a
23 response to the Motion, and on July 7, 2010, an order was entered
24 granting the Valuation Motion. See Docket No. 31.

25 On September 24, 2010, One West filed a proof of claim,
26 claiming a secured claim with respect to the Property ("Claim") in the

1 total amount of \$227,824.63, calculated as of the petition date. See
2 Claim 10-1.

3 On November 16, 2010, Mr. Warkentin filed his initial draft
4 Plan of Reorganization ("Initial Plan"). See Docket No. 84. In the
5 Initial Plan, Mr. Warkentin included One West in two classes: Class 13 to
6 be treated as secured to the extent of \$90,000 and to receive payments of
7 \$483.14 a month, at 5% interest amortized over 30 years; and Class 14 to
8 be treated as unsecured to the extent of \$137,825 and to receive 60 equal
9 payments of \$223.00, without interest, in full satisfaction of One West's
10 unsecured claim.

11 On January 5, 2011, One West filed an election to have its
12 Claim treated as fully secured, pursuant to § 1111(b)(2) and Rule 3014.
13 See Docket No. 94.

14 On January 28, 2011, Mr. Warkentin filed his Second Amended
15 Plan of Reorganization ("Second Plan"). See Docket No. 107. In the
16 Second Plan, One West was classified in a single class, with its Claim to
17 bear interest at the rate of 5% per annum and to be paid in monthly
18 payments of \$483.14 for 360 months, with a further balloon payment of
19 \$53,894.23 to be paid in the 361st month. One West objected to
20 confirmation of the Second Plan, arguing 1) that it was not feasible; 2)
21 that it was not "fair and equitable" for purposes of § 1129(b); 3) that
22 it did not provide for payment of property taxes and insurance with
23 respect to the Property; and 4) that the proposed 5% interest rate was
24 too low, among other things. See Docket No. 126. One West's objection
25 to confirmation of the Second Plan was filed after the deadline for
26 filing objections to the Second Plan and the related disclosure statement

1 set in the scheduling order for the confirmation hearing ("Confirmation
2 Hearing"). See Docket No. 99.

3 The Confirmation Hearing was held on March 21, 2011. At the
4 Confirmation Hearing, after hearing testimony and argument, I struck the
5 late filed objection of One West and confirmed the Second Plan, with
6 modifications as ordered at the Confirmation Hearing. See Docket No.
7 130. An order granting Mr. Warkentin's motion to strike the late filed
8 objection of One West was entered on March 29, 2011. See Docket No. 131.

9 An Order Confirming Plan ("Confirmation Order"), prepared by
10 counsel for Mr. Warkentin, was entered on March 31, 2011. See Docket No.
11 132. In the Confirmation Order, I allowed One West's claim "as a secured
12 claim in the full amount of Proof of Claim No. 10, i.e. \$227,824.63." In
13 addition, the monthly payment amount to One West was increased to
14 \$554.15, with the balance owing on the claim to be "paid not later than
15 361 months after the Effective Date of the Plan."

16 On April 22, 2011, One West filed an amended proof of claim
17 (see Claim 10-2), increasing its secured claim to \$228,874.63 ("Amended
18 Claim"). Although the Amended Claim is only \$1,050 greater than the
19 amount of One West's claim that I allowed in the Confirmation Order, One
20 West represents that the Amended Claim "includes a total of \$1,350.00 in
21 post-petition attorney's fees and costs." Response, Docket No. 143, at
22 p. 1.

23 On May 9, 2011, Mr. Warkentin filed the Objection, objecting to
24 the Amended Claim because it included postpetition attorney's fees. See
25 Docket No. 137. Mr. Warkentin argues that it is not appropriate for One
26 West to claim postpetition attorney's fees because it is undersecured,

1 citing § 506(b). Mr. Warkentin recognizes that One West elected to have
2 its entire claim treated as secured pursuant to § 1111(b), but he
3 essentially argues that is immaterial because the value of the Property
4 is less than the claim amount. Mr. Warkentin did not object to the
5 attorney's fee claim based on reasonableness.

6 One West filed its Response on June 10, 2011, arguing that its
7 Amended Claim including postpetition attorney fees was appropriate,
8 primarily relying on the Ninth Circuit's decision in SNTL Corp. et al. v.
9 Centre Ins. Co. (In re SNTL Corp.), 571 F.3d 826 (2009). See Docket No.
10 143. Mr. Warkentin elected not to file a reply memorandum.

11 12 Jurisdiction

13 I have core jurisdiction to consider and decide the Objection
14 under 28 U.S.C. §§ 1334 and 157(b)(2)(B).
15

16 Discussion

17 The Objection raises issues as to the interaction of an
18 esoteric provision of the Bankruptcy Code, § 1111(b)(2), and more
19 familiar provisions. This is the first time that I have considered the
20 impact of § 1111(b)(2) in this context, and I choose to write because I
21 expect that it will be encountered more frequently in a continuing
22 depressed real estate market.

23 Mr. Warkentin argues that his Objection to One West's Amended
24 Claim should be sustained because it is inappropriate to allow a claim
25 for postpetition attorney fees to an undersecured creditor, citing
26

1 § 506(b).² Section 506(b) provides:

2 To the extent that an allowed secured claim is secured
3 by property the value of which, after any recovery
4 under subsection (c) of this section, is greater than
5 the amount of such claim, there shall be allowed to
6 the holder of such claim, interest on such claim, and
any reasonable fees, costs, or charges provided for
under the agreement or State statute under which such
claim arose.

7 Generally, postpetition attorney's fees and costs will not be allowed as
8 part of a secured claim unless the claim is "oversecured," meaning that
9 the value of collateral securing the claim exceeds the amount of the
10 claim. See 4 Collier on Bankruptcy ¶ 506.04 (Alan N. Resnick and
11 Henry J. Sommer, eds., 16th ed.) ("Collier on Bankruptcy").

12 The Ninth Circuit Bankruptcy Appellate Panel, affirmed by the
13 Ninth Circuit, has concluded that § 506(b) "specifies what may be
14 included in a secured claim" but is not dispositive as to whether a
15 postpetition claim for attorney's fees and costs can be allowed as an
16 unsecured claim. In re SNTL Corp., 571 F.3d at 842-43. See, e.g.,
17 Omect, Inc. v. Burlingame Capital Partners II, L.P. (In re Omect, Inc.),
18 368 B.R. 882, 885 (Bankr. N.D. CA 2007); In re Tricca, 196 B.R. 214, 219-
19 20 (Bankr. D. MA 1996) ("[Section] 506(b) does not create additional
20 exceptions to the allowance of claims; rather it only provides for the
21 classification of allowed claims as secured or unsecured.").

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23
24 ² Under Oregon law, in a dispute between parties with respect to a
25 contract that provides specifically that fees and costs incurred to
26 enforce provisions of the contract will be awarded, the prevailing party
is entitled to "reasonable" attorney's fees. See O.R.S. § 20.096(1). As
noted above, Mr. Warkentin does not challenge the reasonableness of the
fees and costs claimed by One West in its Amended Claim.

1 Claim allowance is the province of § 502. Section 502(a)
2 provides that a claim is allowed unless a party in interest objects.
3 Section 502(b) provides that if a claim objection is filed by a party in
4 interest, the court, after notice and a hearing, will determine the
5 amount of the claim and "shall allow such claim in such amount," subject
6 to specified exceptions.³ None of the specified exceptions applies to
7 _____

8 ³ The specific exceptions are as follows:

- 9 (1) such claim is unenforceable against the debtor and property of the
10 debtor, under any agreement or applicable law for a reason other than
11 because such claim is contingent or unmatured;
12 (2) such claim is for unmatured interest;
13 (3) if such claim is for a tax assessed against property of the estate,
14 such claim exceeds the value of the interest of the estate in such
15 property;
16 (4) if such claim is for services of an insider or attorney of the
17 debtor, such claim exceeds the reasonable value of such services;
18 (5) such claim is for a debt that is unmatured on the date of the filing
19 of the petition and that is excepted from discharge under section 523
20 (a)(5) of this title;
21 (6) if such claim is the claim of a lessor for damages resulting from the
22 termination of a lease of real property, such claim exceeds—
23 (A) the rent reserved by such lease, without acceleration, for the
24 greater of one year, or 15 percent, not to exceed three years, of
25 the remaining term of such lease, following the earlier of—
26 (i) the date of the filing of the petition; and
 (ii) the date on which such lessor repossessed, or the
 lessee surrendered, the leased property; plus
 (B) any unpaid rent due under such lease, without acceleration, on
the earlier of such dates;
(7) if such claim is the claim of an employee for damages resulting from
the termination of an employment contract, such claim exceeds—
(A) the compensation provided by such contract, without
acceleration, for one year following the earlier of—
(i) the date of the filing of the petition; or
(ii) the date on which the employer directed the employee to
terminate, or such employee terminated, performance under such
contract; plus
(B) any unpaid compensation due under such contract, without
acceleration, on the earlier of such dates;

(continued...)

1 One West's \$1,350 claim for postpetition attorney's fees and costs in
2 this case.⁴

3 As the Ninth Circuit Bankruptcy Appellate Panel, again affirmed
4 by the Ninth Circuit, determined in In re SNTL Corp., "we 'must find a
5 basis in section 502 to disallow a claim, and absent such basis, we must

6
7 ³(...continued)

8 (8) such claim results from a reduction, due to late payment, in the
9 amount of an otherwise applicable credit available to the debtor in
10 connection with an employment tax on wages, salaries, or commissions
11 earned from the debtor; or

12 (9) proof of such claim is not timely filed, except to the extent tardily
13 filed as permitted under paragraph (1), (2), or (3) of section 726 (a) of
14 this title or under the Federal Rules of Bankruptcy Procedure, except
15 that a claim of a governmental unit shall be timely filed if it is filed
16 before 180 days after the date of the order for relief or such later time
17 as the Federal Rules of Bankruptcy Procedure may provide, and except that
18 in a case under chapter 13, a claim of a governmental unit for a tax with
19 respect to a return filed under section 1308 shall be timely if the claim
20 is filed on or before the date that is 60 days after the date on which
21 such return was filed as required.

22 ⁴ The only exception that arguably might have some application is
23 § 502(b)(9), which provides for disallowance of claims that are not
24 timely filed. Although the Claim was filed timely, the Amended Claim was
25 filed after the claims bar date of October 27, 2010. See Docket No. 7.

26 Customarily, claimants have been allowed to amend or modify
their claims to reflect increases or decreases in amount,
additional theories supporting the basis of the claim or any
other information relevant to the existence and amount of the
claim. In fact, the official form includes a check-box
indicating that a proof of claim may be amending an earlier
claim.

4 Collier on Bankruptcy ¶ 502.03[10][d]. If the Amended Claim were, in
effect, a "new" claim, increasing the Claim by a material amount, the
analytical result might be different. See, e.g., In re CF & I
Fabricators of Utah, Inc., 148 B.R. 332, 343 (Bankr. D. UT 1992).
However, amending the Claim of \$227,824.63 to add a claim for
postpetition attorney's fees and costs that increases the Amended Claim
amount by a total of \$1,050.00 is not a material enough change to invoke
the § 502(b)(9) exception.

1 allow it.'" 571 F.3d at 838-39 (quoting Wells Fargo Fin. Acceptance v.
2 Rodriguez (In re Rodriguez), 375 B.R. 535, 545 (9th Cir. BAP 2007)).
3 Since no such basis in terms of an exception to allowance of a claim
4 under § 502(b) applies here, and Mr. Warkentin has not raised any issue
5 as to the amount of One West's claim for postpetition attorney's fees and
6 costs, I conclude that One West's claim for postpetition attorney's fees
7 and costs in the amount of \$1,350 should be allowed.⁵ The question
8 remains as to whether it should be allowed as unsecured, or as secured
9 pursuant to § 1111(b)(2).

10 Section 1111(b)(2) provides that if treatment of a claim under
11 said subsection is elected, "then notwithstanding section 506(a) of this
12 title, such claim is a secured claim to the extent that such claim is
13 allowed." By its terms, § 1111(b)(2) does not require that a claim be
14 allowed as secured to benefit from the election. It clearly provides
15 that the claim simply be "allowed." The result seems incongruous, but
16 the statutory language unequivocally states that if I allow a claim, and
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19 ⁵ At the Hearing, counsel for Mr. Warkentin did argue that the terms
20 of the confirmed plan might support the Objection. As noted above, the
21 Confirmation Order included a provision allowing One West's claim "as a
22 secured claim in the full amount of Proof of Claim No. 10, i.e.
23 \$227,824.63." However, Mr. Warkenton did not file an objection to One
24 West's Claim in advance of the Confirmation Hearing, and the amount of
25 One West's claim was not contested at the Confirmation Hearing. In these
26 circumstances, although it is interesting that counsel for Mr. Warkentin
included a provision as to allowance of One West's secured claim in the
Confirmation Order, it is not "law of the case" to preclude the filing
and ultimate allowance of the Amended Claim. See Federal Deposit Ins.
Corp. v. Kipperman (In re Commercial Money Center, Inc.), 392 B.R. 814,
832 (9th Cir. BAP 2008) ("For the law of the case doctrine to apply, the
issue must have been decided, either expressly or by necessary
implication." (Emphasis added)).

1 an 1111(b) election appropriately is made, the claim is a secured claim.

2
3 CONCLUSION

4 I have determined that One West's claim for postpetition
5 attorney's fees and costs is allowed in the amount claimed. Accordingly,
6 under the express terms of § 1111(b)(2), I will overrule the Objection
7 and allow the full amount of the Amended Claim as secured. I will enter
8 an order consistent with this Memorandum Opinion contemporaneously.

9 # # #

10 cc: Bradley Ray Warkentin
11 Anthony V. Albertazzi
12 Jennifer L. Aspaas
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